No. 81-6463

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ORLANDO ROMERO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

# BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether petitioner was denied effective assistance of counsel at his trial.

2. Whether the supplemental instruction of the trial court after the jury indicated that it could not reach a verdict requires reversal of petitioner's conviction.

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## OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-2) is not reported.

## JURISDICTION

The judgment of the court of appeals was entered on March 4, 1982. The petition for a writ of certiorari was filed on April 1, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of possessing cocaine hydrochloride with the intent to distribute it and of conspiracy, in violation of 21 U.S.C. 841(a)(1) and 846. He was sentenced to concurrent terms of eight years' imprisonment, to be followed by a special parole term of 25 years on the substantive count. The court of appeals affirmed (Pet. App. 1-2).

1. After their indictment, petitioner, his brother Edgar Romero, and Edgar's girlfriend, Betty Lemos, moved to suppress the evidence seized during a warrantless search of an apartment in New York City. At the suppression hearing, the government called two witnesses, Special Agent Robert Palombo of the Drug Enforcement Administration and Detective Raymond Vallely of the New York City Police Department. Palombo and Vallely testified that they had been sent by their superiors to the apartment to determine whether a Florida state fugitive, Tenorio Pena, was there (S. Tr. 7, 27, 58, 61-62, 82-83, 94, 116, 120, 142).1/ The officers arrived at the building at approximately 6:30 p.m. (S. Tr. 81) and waited by the elevator on the sixth floor for the purpose of observing the fugitive's exit from or entrance into the apartment (S. Tr. 10, 86).

At approximately 7:30 p.m., petitioner, Edgar, Lemos and a child exited from the elevator, and walked past the three officers toward the apartment. Both Palombo and Vallely testified that petitioner carried a blue flight bag on his shoulder (S. Tr. 12, 89-90, 106). As petitioner, Edgar, Lemos and the child were about to enter the apartment, the officers approached them and identified themselves (S. Tr. 13, 30-31, 90, 136). Palombo asked Edgar his name and requested permission to enter (S. Tr. 14). Edgar identified himself and motioned with his hand for the three officers to enter the apartment (S. Tr. 13-14, 93).

Immediately upon entering the apartment, Vallely conducted a security check of the apartment, which disclosed equipment used in processing cocaine and $30,800 in cash (S. Tr. 94-100, 105-107). In response to the agents' request that they be allowed to use the telephone, Lemos escorted Vallely and Palombo into the

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1/ "S. Tr." refers to the transcript of the suppression hearing.

bedroom, where Vallely observed a clear plastic bag containing white powder next to the telephone on the nightstand (S. Tr. 19-20, 101-102). Thereafter, Vallely observed that petitioner, who was seated in the living room, was using his foot to push away the blue flight bag, which was on the floor next to him. The flight bag was seized and found to contain a quantity of white powder wrapped in clear plastic bags (S. Tr. 104-105; see also id. at 25).

Lemos and Edgar testified at the suppression hearing that they lived in the apartment and that petitioner did not reside there (S. Tr. 201, 236-237, 242, 244). Lemos stated that Edgar had obtained the $30,800 from the sale of drugs and had used the equipment to process cocaine (S. Tr. 256-258). Edgar testified that the packet of cocaine on the bedroom nightstand and the equipment belonged to him (S. Tr. 228-230). Edgar also testified that the blue flight bag and the cocaine in it belonged to him, that petitioner had not carried the bag into the apartment or kicked it under the chair, and that the bag was located under the chair even before they entered the apartment (S. Tr. 203-204, 221-222, 231-232). Lemos testified that she had not seen the blue bag until the officers pulled it from under the chair and did not see petitioner carry it into the apartment (S. Tr. 258-259).

The district court, relying upon this Court's decision in Steagald v. United States, 451 U.S. 204 (1981), held that under the circumstances, the attempt to locate the fugitive inside the apartment required a search warrant. Accordingly, the court suppressed, as to Edgar and Lemos, all of the evidence that was seized during the warrantless search. The government did not appeal from this order, and the indictments against Edgar and Lemos were dismissed. However, the court denied petitioner's suppression motion on the ground that he had no legitimate

expectation of privacy in the apartment, the blue flight bag, or the other evidence seized.

2. At petitioner's trial, the government called three witnesses. Palombo and Vallely repeated their suppression hearing testimony that they had observed petitioner carrying the blue flight bag into the apartment (7-27-81 Tr. 23, 45, 55-56).2/ Vallely also testified that petitioner, while seated in the wicker chair in the apartment, had attempted to push the bag away with his foot (7-27-81 Tr. 54).

Another detective testified that from his car, which was parked on the street, he observed petitioner, Edgar, Lemos, and the child enter the apartment building and that "[o]ne of the males was carrying a blue flight bag over his shoulder" (7-27-81 Tr. 84). Later, the same detective observed petitioner inside the apartment "seated in a wicker chair * * * kicking the blue flight bag with his leg as to try and push it behind the chair" (7-27-81 Tr. 86; see also id. at 87).

On the second day of trial, defense counsel informed the court that Edgar was going to take the stand as a defense witness. The court questioned Edgar and ascertained that Edgar did not understand that any self-incriminating testimony he might give at petitioner's trial could form the basis of a new indictment against him. Accordingly, the court refused to allow Edgar to testify unless he first conferred with his attorney concerning his Fifth Amendment rights (7-28-81 Tr. 7-15). Petitioner then took the stand and testified that he did not live in the apartment, that he did not carry the blue flight bag into the apartment, and that the bag had been located beneath the wicker chair (7-28-81 Tr. 20, 22, 23, 26). After petitioner testified,

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2/ It was stipulated that certain exhibits, including the white powder inside the blue flight bag, were cocaine hydrochloride of varying purities (7-27-81 Tr. 101-103).

his attorney decided not to call Edgar to testify (7-28-81 Tr. 48).

3. On appeal, petitioner, represented by new counsel, contended that his trial counsel rendered ineffective assistance. The court of appeals rejected this contention. The court observed that the primary basis of petitioner's Sixth Amendment claim was that counsel had failed to seek to introduce, pursuant to Fed. R. Evid. 804(b)(1),3/ the testimony given by Edgar at the suppression hearing.4/ The court concluded, however, that there was a "real question" whether the testimony given at the suppression hearing would have been admissible at trial under Rule 804(b)(1) and, accordingly, that counsel was not incompetent for failing to attempt to introduce it. Pet. App. 1-2. The court of appeals declined petitioner's invitation to change the "farce and mockery" formulation of the test of ineffective assistance of counsel utilized in the Second Circuit and to replace it with a standard of "reasonable competence" adhered to in other circuits. The court noted that its prior precedents utilizing the "farce and mockery" formulation could not be overruled without an en banc hearing, which seemed to the court

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3/ Fed. R. Crim. P. 804(b)(1) provides:

> (b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

4/ The court also concluded that trial counsel's failure to move for a judgment of acquittal under Fed. R. Crim. P. 29 did not constitute ineffective assistance of counsel. Pet. App. 2.

"inappropriate in this case" (Pet. App. 2). The court of appeals also rejected petitioner's contention that a supplemental charge to the jury violated his rights under Allen v. United States, 164 U.S. 492 (1896), and In re Winship, 397 U.S. 358 (1970).

ARGUMENT

1. Petitioner contends (Pet. 7-13) that the Court should grant certiorari to review the court of appeals' formulation of the standard for determining whether counsel's performance was constitutionally ineffective. Under the Second Circuit's formulation, counsel's performance is deemed ineffective if it rendered the trial a "farce and mockery of justice." Pet. App. 2, citing United States v. Aulet, 618 F.2d 182, 187 (2d Cir. 1980).

a. Petitioner is correct in asserting (Pet. 8) that the other courts of appeals no longer use the "farce and mockery" language. Rather, they describe the test as whether the attorney rendered reasonably competent assistance or assistance within the range of competence demanded of attorneys in criminal cases.5/ See also Engle v. Isaac, No. 80-1430 (April 5, 1982), slip op. 25; Cuyler v. Sullivan, 446 U.S. 335, 344 (1980); Tollett v. Henderson, 411 U.S. 258, 266-269 (1973); McMann v. Richardson, 397 U.S. 759, 770-771, 774 (1970).

The Second Circuit, then, is the only court of appeals that has not formally abandoned the "farce and mockery" language. However, as petitioner acknowledges (Pet. 8), even panels of that court, or individual members of such panels, have on numerous occasions indicated a willingness, in an appropriate case, to

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5/ Contrary to petitioner's contention (Pet. 8), the Tenth Circuit has abandoned the "farce and mockery" language. See Dyer v. Crisp, 613 F.2d 275, 278 (en banc), cert. denied, 445 U.S. 945 (1980). The general movement of the courts of appeals away from the "farce and mockery" language is described in our briefs in opposition in Decoster v. United States, No. 79-5187, at 8-10 n.8, and Altamirano v. United States, No. 80-6108, at 9-10.

reconsider use of that formulation. But these panels have found it unnecessary thus far to do so, generally finding in the circumstances of the particular case that counsel's performance would not have violated the reasonable competence standard utilized by other courts of appeals.6/ The panel below took a similar approach in declining petitioner's suggestion that the "farce and mockery" standard be changed, concluding that the necessary en banc review would be "inappropriate in this case." Pet. App. A1-A2. The panel's conclusion is understandable, for as we explain below, defense counsel's performance in this case likewise satisfied the formulation employed by other courts of appeals.

b. The principal ground for petitioner's argument that he received ineffective assistance of counsel at trial is that counsel did not seek to introduce the testimony given by petitioner's brother, Edgar, at the suppression hearing. See Pet. 11-12. Petitioner asserts that this testimony -- that the cocaine, equipment, and blue flight bag belonged to Edgar and that petitioner did not carry the flight bag into the apartment

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6/ See United States v. Helgeson, 669 F.2d 69, 71 (1982); United States v. Alessi, 638 F.2d 466, 477 (1980); Brinkley v. Lefevre, 621 F.2d 45, cert. denied, 449 U.S. 868 (1980); United States v. Aulet, 618 F.2d 182, 187 (1980); Twitty v. Smith, 614 F.2d 325, 333 & n.10 (1979); Bellavia v. Fogg, 613 F.2d 369, 374 (1979); Indiviglio v. United States, 612 F.2d 624, 629 n.8 (1979), cert. denied, 445 U.S. 933 (1980); id. at 632 (Mansfield, J., concurring); United States v. Menendez, 612 F.2d 51, 55 (1979); United States v. Taylor, 562 F.2d 1345, 1360, cert. denied, 432 U.S. 909 (1977); United States v. Medico, 557 F.2d 309, 318 n.15, cert. denied, 434 U.S. 986 (1977); Rickenbacker v. Warden, 550 F.2d 62, 66 (1976), cert. denied, 434 U.S. 826 (1977). See also Barnes v. Jones, 665 F.2d 427, 431 n.4 (2d Cir. 1981), cert. granted, No. 81-1794 (June 7, 1982).

(see page 3, supra) -- would have been admissible under Fed. R. Evid. 804(b)(1).7/

As an initial matter, we note that petitioner's ineffective assistance of counsel claim was not presented to the district court, either in a motion for a new trial or in a motion under 28 U.S.C. 2255, so there has not been an opportunity for a hearing or other factual inquiry into the reasons for counsel's failure to seek to introduce Edgar's suppression hearing testimony at trial. We believe that such a claim ordinarily should first be presented to the district court, so that, if the court deems it necessary,8/ such an inquiry and appropriate findings can be made regarding counsel's asserted failings and any prejudice resulting therefrom. See United States v. Lurz, 666 F.2d 69, 78 (4th Cir. 1981); United States v. Aulet, supra, 618 F.2d at 185-186; United States v. Schreiber, 599 F.2d 534, 538 (3d Cir.), cert. denied, 444 U.S. 1031 (1979).

In the present case, for example, it is possible that such an inquiry would establish that counsel's failure to seek to introduce Edgar's suppression hearing testimony resulted from a tactical assessment that Edgar's open admissions of his own drug dealings would not be likely, on balance, to advance petitioner's cause significantly or might actually harm the defense. This

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7/ Petitioner also appears to argue (Pet. 10-11) that counsel was incompetent in not calling Edgar and Lemos to testify at trial. But if Edgar and Lemos consulted with their attorneys, which, petitioner concedes (Pet. 10-11), the district court properly made a precondition to their testifying, the attorneys surely would have advised them to assert their Fifth Amendment privilege. It seems quite clear, then, that Edgar and Lemos would not have given testimony to exculpate petitioner, for that would have required them to incriminate themselves by asserting that the flight bag and the cocaine it contained, as well as the other cocaine and equipment found in the apartment, were theirs. Given this, counsel's failure to go through the formality of calling Edgar and Lemos, only to have them invoke their Fifth Amendment privilege at the critical point, surely was within the range of reasonable competence expected of defense counsel. Indeed, it may be that counsel already had ascertained by the time the defense rested that Edgar and Lemos would not testify.

8/ See Chambers v. Maroney, 399 U.S. 42, 54 (1970).

possibility is supported by the fact that petitioner testified on cross-examination at trial that Edgar had lived with him for eight months in 1979 and that he suspected that Edgar was involved in the sale of cocaine (7-28-81 Tr. 27, 40). Given petitioner's testimony, counsel reasonably could have concluded that it would not be wise to press for admission of Edgar's prior testimony, especially in view of Edgar's obvious incentive to lie at the suppression hearing in order to protect his brother. Even if a court might in retrospect disagree with counsel's assessment of the facts and risks, this does not render counsel's assistance constitutionally ineffective. Tollett v. Henderson, supra, 411 U.S. at 267; McMann v. Richardson, supra, 397 U.S. at 770-771.9/

Possible tactical considerations to one side, however, petitioner's claim of ineffective assistance of counsel is without merit even under a standard of "reasonable competence" because it does not appear that Edgar's suppression hearing testimony would have been admissible at trial under Fed. R. Evid. 804(b)(1) in any event. That rule provides that testimony given as a witness at another hearing is not excluded by the hearsay rule if the party against whom it is offered "had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination" in the prior proceeding. In the present case, the attorney for the government did not have a "similar motive" to develop Edgar's testimony regarding petitioner's involvement at the suppression hearing because the issues in that hearing were entirely different from those at trial. At the outset of the suppression hearing, the court stated that the issues to be determined were whether Edgar and Lemos consented

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9/ It also is possible, of course, that it did not occur to petitioner's attorney to attempt to introduce Edgar's suppression hearing testimony once he had determined not to call Edgar to testify. But as this Court only recently emphasized, the Sixth Amendment does not insure that counsel will recognize and pursue every possible claim in defense of his client. Engle v. Isaac, supra, slip op. 25.

to the agents' entry into their apartment and whether the agents had probable cause to enter to search for the fugitive (S. Tr. 4, 5). Throughout the proceedings the court repeatedly confined direct and cross examination to these issues (S. Tr. 58, 69, 67, 70, 71, 72, 73, 79, 140, 141, 181, 182, 183, 185, 188, 237, 238, 258). The guilt or innocence of the three defendants charged in the indictment, including petitioner, was not in issue, and the government therefore did not have a motive fully to test Edgar's assertions that the cocaine and blue flight bag belonged to him and that petitioner did not carry the flight bag into the apartment.

The Advisory Committee Note to Rule 804(b)(1) states in this regard that it was generally required at common law that in order for prior testimony to be admissible, the issues at the former and later proceedings had to be identical or substantially identical, "as a means of insuring that the former handling of the witness was the equivalent of what would now be done if the opportunity were presented." The Note then states that "[s]ince identity of issues is significant only in that it bears on motive and interest in developing fully the testimony of the witness," it was preferable to express the test of admissibility under Rule 804(b)(1) in terms of motive. Here, where the issues at the suppression hearing and trial were entirely different, the requisite "similar motive" for developing fully the testimony in question did not exist in the two proceedings.10/

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10/ A suppression hearing differs in this respect from a preliminary hearing, the type of proceeding involved in a number of decisions of this Court concerning the admissibility of prior testimony under the Confrontation Clause. Ohio v. Roberts, 448 U.S. 56, 68-73 (1980); California v. Green, 399 U.S. 149, 165-168 (1980); Barber v. Page, 390 U.S. 719, 725-726 (1968); Pointer v. Texas, 380 U.S. 400, 407 (1965). A preliminary hearing involves an inquiry into the merits of the charge that will again be explored at the trial itself, although the government's burden of proof at the preliminary hearing is simply to establish probable cause, not guilt beyond a reasonable doubt. Barber v. Page, supra, 390 U.S. at 725.

Moreover, it is especially significant in the context of this case that the Second Circuit -- the court whose precedents controlled the conduct of petitioner's trial -- previously had ruled that the suppression hearing testimony of a co-defendant was not admissible on behalf of the defendant at trial because the issue at the hearing was not the guilt or innocence of the defendant. United States v. Wingate, 520 F.2d 309, 315-316 (2d Cir. 1975), cert. denied, 423 U.S. 1074 (1976).11/ Given the Second Circuit's decision in Wingate, it would have been well within the range of competence ordinarily expected of attorneys in criminal cases for counsel to conclude that Edgar's suppression hearing testimony was inadmissible at trial. The court of appeals agreed when it affirmed petitioner's conviction, concluding, citing Wingate, that there was a "real question" whether Edgar's suppression hearing testimony would have been admissible at trial (Pet. App. 1-2).12/ Thus, whether the

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11/ The trial in Wingate occurred before Fed. R. Evid. 804(b)(1) became effective, but the Second Circuit nevertheless relied on that rule. 520 F.2d at 316. In the present case, the pertinent testimony by Edgar was given during the government's cross-examination of him at the suppression hearing. It does not appear that this was the case in Wingate. This does not significantly distinguish the two cases, however. In the present case, the government did not have a motive to "fully develop" the testimony relating to Edgar's involvement, as the Advisory Committee Note, quoted above, would seem to require, and the government did not in fact do so. Compare Ohio v. Roberts, supra, 448 U.S. at 70-71.

12/ Petitioner relies (Pet. 11) on three decisions from other circuits which, unlike Wingate, were not controlling precedent in the Second Circuit and therefore cannot serve as an appropriate measure of counsel's performance. In any event, the three decisions are readily distinguishable.

In United States v. Zurosky, 614 F.2d 779, 791-793 (1st Cir. 1980), the trial court had explicitly warned counsel that the suppression hearing witness's testimony might be admissible at trial under Fed. R. Evid. 804(b)(1), and the court accordingly invited cross-examination on the question of guilt or innocence. The First Circuit held that the repeated warnings of the trial court served to widen the scope of the suppression hearing to put guilt or innocence in issue, and it distinguished the Second Circuit's decision in Wingate on precisely this ground. 614 F.2d at 792-793. No such warnings or widening of the scope of the suppression hearing occurred here. In United States v. Curry, 471 F.2d 419 (5th Cir.), cert. denied, 411 U.S. 95 (1973), there was of course no discussion of the yet to be adopted Rule 804(b)(1). (continued)

inquiry into counsel's performance is pursued under the "farce and mockery" or "reasonable competence" rubric, it is clear that petitioner did not receive constitutionally ineffective assistance of counsel, in view of the prior application of Rule 804(b)(1) by the Second Circuit in Wingate.13/

c. Because there has been a general movement by the courts of appeals away from the "farce and mockery" formulation; because the

Moreover, because a portion of the declarant's suppression hearing testimony in fact was admitted at defendant's trial, the court of appeals simply concluded that the declarant's subsequent sworn statement partially repudiating that testimony should have been admitted as well. 471 F.2d at 421. The last appellate decision cited by petitioner, United States v. Thomas, 571 F.2d 285 (5th Cir. 1978), is wholly inapposite because it involved Rule 804(b)(3), not Rule 804(b)(1).

Petitioner, relying on this Court's decision in Chambers v. Mississippi, 410 U.S. 824 (1973), even goes so far as to assert (Pet. 11) that the Constitution would have mandated the admission of Edgar's suppression hearing testimony even if Rule 804(b)(1) would have barred it. The Second Circuit previously had rejected this argument in United States v. Wingate, supra, 520 F.2d at 316, and counsel's performance therefore cannot be thought to have been ineffective on this ground either. Moreover, here, as in Wingate, the suppression hearing testimony did not have indicia of reliability even approaching those of the testimony of the three persons to whom the individual in Chambers v. Mississippi assertedly had confessed. There, the declarant, unlike Edgar, was available at trial for cross-examination by the prosecution. 410 U.S. at 301. In addition, the declarant in Chambers made each of his three confessions spontaneously to a close acquaintance shortly after the crime, and there was independent corroboration of the declarant's statements by eyewitnesses. Id. at 300. Finally, although the Court stated in Chambers that the declarant stood to gain nothing by disclosing his role in the shooting (410 U.S. at 301), Edgar had a powerful incentive to assert that he alone was involved in drug dealing in order to exculpate his brother, especially since his suppression hearing testimony could not be admitted against him at trial. United States v. Salvucci, 448 U.S. 83, 89-90 (1980).

13/ Petitioner also suggests (Pet. 12-13) that counsel's assistance was ineffective because counsel: did not request a jury instruction regarding the weight to be given a police officer's testimony until after the court had completed its instructions, at which point it was denied; was uncertain until late in the trial whether he would call petitioner to testify; did not make a motion for a judgment of acquittal under Fed. R. Crim. P. 29; and conducted "less than stellar cross-examination." Petitioner concedes (Pet. 12, 13) that these are subsidiary points, and they warrant little attention here. Thus, petitioner acknowledges that whether to give the requested jury instruction would have been "in the discretion of the court" (Pet. 12); he fails to point to any prejudice resulting from counsel's uncertainty about whether petitioner would testify; he fails to explain why a Rule 29 motion would have succeeded; and he does not specify any particular shortcomings in counsel's cross-examination or identify what else could have been elicited.

Second Circuit itself has indicated that it would be prepared to reconsider that formulation in an appropriate case, but simply did not find this to be such a case; and because counsel's performance here satisfied either formulation in any event,[14] review by this Court is not warranted. We note as well that the Court recently granted certiorari in Jones v. Barnes, No. 81-1794, which concerns the standard by which appellate counsel's performance is to be judged. Petitioner apparently intends to argue in that case, inter alia, that the standard should be no different from that governing counsel's conduct at trial. See No. 81-1794 Pet. for Certiorari, at 7-8, 9-10. The Court therefore may have occasion in Jones v. Barnes to consider the appropriate formulation of a standard for effective assistance of counsel at trial as well. For this additional reason, review in the instant case is unwarranted, especially since Jones v. Barnes likewise involves review of a Second Circuit decision.

2. Petitioner's argument (Pet. 14-16) regarding the supplemental charge to the jury warrants little discussion. Petitioner failed to raise an objection to the charge at trial, and he therefore is barred from raising such an objection on appeal

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14/ It is not clear that the difference between the "farce and mockery" and "reasonable competence" standards is anything more than semantic. Even under a reasonable competence standard the defendant must prove "serious derelictions" on the part of counsel (McMann v. Richardson, supra, 397 U.S. at 774; see also our brief in opposition in Jennings v. United States, No. 81-6296, at 6-7), as well as prejudice (Chambers v. Maroney, supra, 399 U.S. at 54; see also our brief amicus curiae in Morris v. Slappy, No. 81-1095, at 9-11 & n.2), in order to establish a violation of the Sixth Amendment right to the effective assistance of counsel. The phrase "farce and mockery" largely serves to emphasize that there must be such a substantial departure from the range of competence ordinarily expected of defense counsel, and its application therefore probably affects the outcome in few, if any, cases. The Ninth and Tenth Circuits acknowledged this point when they abandoned the "farce and mockery" language, Dyer v. Crisp, 613 F.2d 275, 278 (10th Cir. 1980) (en banc); Cooper v. Fitzharris, 586 F.2d 1325, 1329 (9th Cir. 1978) (en banc), cert. denied, 440 U.S. 979 (1979), and Judge Leventhal similarly observed in United States v. Decoster, 624 F.2d 196, 206 (D.C. Cir.), cert. denied, 444 U.S. 944 (1979), that the differing formulations may be little more than a "semantic merry-go-round."

unless the charge constituted plain error. Fed. R. Crim. P. 30, 52(b). Clearly it did not.

Petitioner argues that the court "could have conveyed an erroneous impression" regarding the standard of proof in a criminal trial (Pet. 15) when it charged the jury that "[t]here is nothing peculiarly different in the way a jury should consider the evidence in a criminal case from that in which all reasonable persons treat any question depending upon evidence presented to them." 7-29-81 Tr. 5. This contention is frivolous. It is clear in context that the court was simply explaining the manner in which evidence is to be evaluated, not the government's burden of proof in a criminal case. Indeed, after reciting the sentence to which petitioner objects, the court stressed no fewer than six times in its supplemental charge that the evidence must establish guilt beyond a reasonable doubt. 7-29-81 Tr. 8, 9, 10, 11, 13, 14. In light of the trial court's subsequent admonitions and viewing the charge as a whole (see, e.g., United States v. Frady, No. 80-1595 (April 5, 1982), slip op. 17), the isolated passage upon which petitioner relies could not have conveyed the impression that a lesser showing of guilt would suffice.

Petitioner also contends (Pet. 15) that the court's statement that this was "not a complex case" and presented "a question of credibility and common sense" (7-29-81 Tr. 3, 4) had the effect of suggesting that the government's case was more plausible than petitioner's and therefore might have placed pressure on jurors leaning in favor of acquittal to vote instead to convict. This contention, too, is frivolous. Immediately after these statements, and after informing the jurors of their duty to deliberate with one another, the court stressed that each juror must decide the case for himself. The court then instructed the jurors: "[D]o not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict" (7-29-81 Tr. 5). The

isolated phrases cited by petitioner, especially when considered in light of this explicit charge, clearly were not coercive.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1982